Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-541-90
JEMURI SERJAN CJ (BORNEO), GUNN CHIT TUAN SCJ AND CHARLES HO J
16 DECEMBER 1991

Land Law *— Caveat — Application to remove private caveat — No prior approval of Estate Land Board — Whether there is serious question to be tried — Balance of convenience — National Land Code 1965 ss 214A, 323, 327 & 340*

The appellant had sold and transferred a piece of land to the respondent. The said land formed part of the Lukut Estate and subsequently the appellant objected to the transfer of the land to the respondent on the ground that no approval from the Estate Land Board for the transfer had been obtained. The appellant entered a private caveat on the register document of title of the said land. The respondent applied to remove the caveat and the application was granted by the learned trial judge. The appellant appealed.

Held, by a majority, allowing the appeal (Gunn Chit Tuan SCJ dissenting):
In the present case the appellant's claim is not frivolous and vexatious and there are serious questions to be tried. The balance of convenience would be in favour of leaving the caveat in existence until the trial of the action in the absence of special circumstances.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah menjual dan memindah milik sekeping tanah kepada responden. Tanah itu merupakan sebahagian Estet Lukut dan kemudiannya perayu telah membantah terhadap pemindahan milik tanah itu kepada responden atas alasan kelulusan belum diberi bagi pemindahan milik itu oleh Lembaga Tanah Estet. Perayu telah memasukkan kaveat persendirian atas dokumen hak milik daftaran. Responden memohan supaya kaveat itu diketepikan dan permohonan itu telah dibenarkan oleh hakim yang arif. Perayu telah merayu.

Diputuskan, oleh majoriti, membenarkan rayuan itu (Gunn Chit Tuan HMA bertentangan):
Di dalam kes ini permohonan perayu tidaklah sia-sia dan menyusahkan dan terdapat soalan-soalan yang penting untuk dibicarakan. Imbangan kemudahan adalah bagi membenarkan kaveat itu wujud hingga perbicaraan tindakan itu, jika tidak ada apa-apa keadaan yang istimewa.

Cases referred to

1 *Hassan v Ismail* [1970] 1 MLJ 210 (distd)
2 *Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd* [1989] 1 MLJ 33 (distd)
3 *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 (distd)
4 *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (distd)
5 *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (refd)
6 *Chin Cheng Hong v Hameed & Ors* [1954] MLJ 169 (refd)
7 *Mahadevan & Anor v Patel* [1975] 2 MLJ 207 (refd)
8 *Re Faulke's Caveat* (1906) 26 NZLR 392 (refd)
9 *Municipal District of Concord v Coles* (1906) 3 CLR 96 (refd)
10 *Su Meu Ging v Philip Yong Khiam Poon & Ors* [1988] 3 MLJ 86 (refd)
11 *Erico Estates Sdn Bhd & Anor v Registrar of Titles, Kedah* [1980] 2 MLJ 293 (refd)
12 *Plimmer Bros v St Maur* (1906) 26 NZLR 294 (refd)

Legislation referred to

National Land Code 1965 ss 214A, 323, 327(1), 340

Appeal from: Originating Motion No S6-25-2-1990 (High Court, Kuala Lumpur)

Haji Sulaiman bin Abdullah (*Zain & Co*) for the appellant.
YM Siew (*Soo Thien Ming & Shahrizat*) for the respondent.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the majority judgment of the court): At the conclusion of the hearing of this appeal the court allowed the appeal but took time to give reasons for allowing the appeal. Here are our reasons. (Jemuri Serjan CJ (Borneo) and Charles Ho J; Gunn Chit Tuan SCJ dissenting.)

This is an appeal from a judgment of the High Court at Kuala Lumpur in proceedings under s 327(1) of the National Land Code 1965, claiming the removal of a private caveat which had been entered on the register document of title to the land under s 322 of the Code. The learned judge granted the application and ordered the removal of the caveat. He gave his reasons in a written judgment which was delivered on 3 December 1990. From this judgment and order of the High Court the appeal was brought before us.

By a sale and purchase agreement dated 20 March 1980 ('the agreement') the appellant, the defendant in the court below, agreed to sell to one Ezan Sdn Bhd a parcel of land held under document of title Grant No 4125, Lot No 849 situate in the mukim of Port Dickson, District of Coast, Negeri Sembilan at the price of $972,000 subject to the terms and conditions stipulated in the agreement. The appellant also agreed to hand over to Ezan Sdn Bhd a valid and registrable memorandum of transfer in favour of Ezan Sdn Bhd or its nominee within two months of the payment

of the full purchase price. Subsequent to the signing of the agreement, Ezan Sdn Bhd resolved to sell the said land together with another piece of land held under Grant No 17065, Lot 1421, to the respondent for a purchase price of $1,994,442.

Thereupon, Ezan Sdn Bhd notified the appellant by a letter dated 13 August 1981 of its intention to nominate the respondent as its nominee, pursuant to cl 2 of the agreement. Apparently, the appellant raised no objection to the letter, and delivered to the solicitors of the respondent a duly executed memorandum of transfer of Lot 849 in favour of the respondent upon the respondent's solicitors undertaking to effect payment to the appellant of the balance of the purchase price upon presentation of the memorandum of transfer for registration. On 20 August 1981 the respondent's solicitors wrote to the appellant to inform it that a portion of Lot 849 had been compulsorily acquired by the authorities and thereby the purchase price had to be adjusted and reduced to $942,000. On 22 September 1981 the full purchase price was duly paid to the appellant. Thereupon, the memorandum of transfer of Lot 849 in favour of the respondent was duly presented for registration on 22 September 1981. In the events that happened, the respondent received a letter from the appellant on 3 February 1987, some six years later, objecting to the transfer of the said land to the respondent on the ground that no approval from the Estate Land Board for such transfer had been obtained. Later, it came to the notice of the respondent that a private caveat had been entered on the register document of title by the appellant on 8 November 1989.

The appellant in its affidavit in opposition to the application for the removal of the caveat averred that the land held under Lot 849 was but a portion of the appellant's Lukut Estate which comprised several contiguous lands totalling 1,400 acres all told. That being the case, it was expressly stipulated in cl 2 of the agreement that the sale and purchase agreement was conditional upon the Estate Land Board, either certifying that the sale of the said land was not affected by the provisions of s 214A of the Code or upon approval of the Estate Land Board being given. By way of denial, the appellant averred that on or about 22 September 1981, in breach of cl 2 of the agreement, Ezan Sdn Bhd caused a transfer of Lot 849 to be registered in the name of its nominee, the respondent, despite the fact that no application had been made to the Estate Land Board. Thereupon, since Lot 849 was a portion of the bigger Lukut Estate, an estate land within the meaning of s 214A of the Code, it was within the purview of this section, and prior approval of the Estate Land Board must be obtained, failing which the transfer was rendered null and void for breach of the agreement and/or s 214A of the Code.

When the appellant discovered that Ezan Sdn Bhd had caused the transfer to be registered in the name of the respondent, the appellant through its solicitors, requested Ezan Sdn Bhd and the respondent to seek a rectification of the register document of title and effect a retransfer of Lot 849 to the appellant, stating that it was ready and willing to refund the moneys that had been paid by Ezan Sdn Bhd. The respondent had refused to do so. The appellant, therefore, instituted proceedings in court and a Writ of Summons No S5-22-237-1987 dated 11 June 1987 and a statement

of claim was filed in the High Court at Kuala Lumpur on 22 April 1987 naming Ezan Sdn Bhd and the respondent as first and second defendants respectively. In this civil suit the appellant sought for:

(a) a declaration that the registration of the transfer of the said land to the second defendant without the prior consent of the Estate Land Board was null and void;
(b) an order that the register of titles be rectified by the reinstatement of the plaintiff as proprietor of the said land in place of the second defendant and on such rectification all moneys that have been paid to the plaintiff be refunded to the first defendant;
(c) if necessary an order that the first and second defendants do cause a retransfer of the said land to the plaintiff.

The caveat which was lodged on 8 November 1989 was intended to preserve the status quo of the parties pending the determination of the civil suit in the High Court.

It is evident from the affidavits of the appellant and the respondent that there are serious disputes on several crucial issues, particularly on the applicability of s 214A with regard to the transaction, involving the construction of s 214A and the interpretation of the words 'estate land' as used in this section. Thus, in its affidavit the respondent disputed the appellant's right to lodge the caveat on the ground that Lot 849 did not come within the purview of s 214A because it was not at the material time 'estate land' as defined in s 214A(1) and the transfer was not 'to two or more persons' as stipulated in s 214A(1). Therefore, the approval of the Estate Land Board was not essential and it followed that the transfer was valid. The appellant, on the other hand, averred that upon the true construction of s 214A in its entirety, this section applied as Lot 849 was but a portion of a bigger Lukut Estate of 1,400 acres. The approval of the Estate Land Board and a certificate of approval issued by the Estate Land Board were the necessary prerequisites for the validity of the transfer. Waiver was raised in the affidavit of the respondent but reliance on it was abandoned at the hearing of the application. The other area of dispute is the respondent's claim that it had obtained approval for the sub-division of Lot 849 and its conversion of category of use whereby a sum of $3m had already been expended for its development and improvement thus making restitutio in integrum impossible. Besides, its title was now indefeasible by virtue of s 340 of the Code. The appellant disputed this claim, admitting only that some construction had commenced on the land and in fact had warned the respondent that it would not be liable for any loss or damage in the event the civil suit were decided in its favour.

The learned judge, well aware, we must assume, that under s 327 of the Code, he has a discretion to allow or refuse the removal of the caveat, decided that the caveat should be removed from the register document of title, basing his decision on the several grounds canvassed by learned counsel for the respondent. It seems to us that the learned judge fell into error when he decided the application on the basis of the consideration of the merits of the civil suit against the respondent on the assumption that the action would never come to trial but in effect would finally be disposed of

by these interlocutory proceedings. This is evident from his judgment on this aspect when he decided that s 214A which prohibits the transfer of estate land without prior approval of the Estate Land Board merely made it an offence to transfer estate land without such approval, but did not specifically declare that such a transfer was null and void ab initio on account of the infraction of s 214A of the Code. To support his view he quoted the Federal Court decision in the case of *Hassan v Ismail*,[1] which he considered to be applicable in the case before him, both on law and on facts. Therefore, once the transfer was valid then the respondent's title was protected under s 340 of the Code. Secondly, relying on the decision of this court in the case of *Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd*,[2] he held that since the full purchase price of Lot 849 had been paid the appellant was precluded from lodging the caveat or, in other words, the appellant had no longer any caveatable interest in the land. Thirdly, there was an inordinate delay in lodging the caveat without reasonable explanations for the delay and on the authority of the Singapore High Court case of *Teo Ai Choo v Leong Sze Hian*[3] where there was a delay of one year before civil action was instituted, the caveat should be removed. He continued to hold that the delay had prejudiced the interest of the respondent. Lastly, restitutio in integrum was impossible because the land had been sub-divided and charged to a bank, and therefore the appellant was estopped from attacking the validity of the transfer of the land. We are not oblivious of the fact that the learned judge's decision was very much influenced by the respondent's arguments before him, and it was palpably evident that his judgment was entirely and substantially grounded upon the respondent's submissions without even apparent or cursory consideration of the appellant's arguments which, in our view, are not without some merit, thus demonstrating an aberrant approach to the issues before him by looking at them from a wrong perspective. We will deal with this matter later.

The crucial issue for our determination is whether in order to support the caveat to remain in force, the appellant has succeeded in satisfying us that it is a body at whose instance a caveat may be entered under s 323(1)(a). This seems to be the logical approach to the issue. Be that as it may, the approach that is common in Malaysia before the case of *Eng Mee Yong & Ors v Letchumanan*[4] was decided by the Privy Council, is to ask the question whether the caveator has a caveatable interest which terms are not defined in the National Land Code 1965, by applying to him para (a) of sub-s (1) of s 323 of the Code. The relevant question which the court should address itself to is: Is the appellant a person claiming title to, or registrable interest in any alienated land, or any right to such title or interest? If it is not, that ends the matter and the caveat cannot be allowed to remain. The factual matrix of the claim to be a person or body within the purview of para (a) of the subsection must be minutely considered by evidence to establish that the claim is not frivolous or vexatious. This approach can be best illustrated by reference to the judgments of all the three Federal Court judges in the Federal Court case of *Macon Engineers Sdn Bhd v Goh Hooi Yin*[5] where reference was made to s 323(1)(a) of the Code in the course of the judgments. At p 54 Gill CJ (Malaya), in dealing with s 323(1)(a) of the Code, says:

As regards the first question, s 323(1)(a) of the National Land Code 1965 provides that a private caveat may be entered at the instance of 'any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest'. It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument, but it cannot be denied that he has a right under that agreement to such title or interest by bringing an action for specific performance of the agreement, which in fact he has already done.

At p 56, Ali FJ quoted Buhagiar J in the case of *Chin Cheng Hong v Hameed & Ors*[6] at p 170 where Buhagiar J said:

... This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (*In re Registration of Caveat* (1908) Innes 114)....

Further on is his judgment, Ali FJ said this:

So far as the words 'any person claiming title to or any registrable interest in land' are also used in s 323(1)(a) of the National Land Code 1965 it is a matter for consideration whether the view taken by Buhagiar J in *Chin Cheng Hong* or that taken by Wilson J in the other case is a correct statement of the law. Speaking for myself I incline to the view taken by Buhagiar J for the following reasons.

Raja Azlan Shah FJ (as he then was) dealt with the same subject in the following words at p 57:

... In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest. There is statutory support for his view vide s 323(1)(a) of the National Land Code 1965 which appears wide enough to include any person claiming any right to title or interest in land. This section is enacted in wider terms as compared with the corresponding provisions of previous legislation — see s 166 of the Land Code 1926.

At p 58 the learned judge continued in the following words:

In my opinion what the court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a prima facie case, and that his claim is not baseless or frivolous. In such circumstances the court will not summarily remove the caveat but will extend it until the hearing of the action. The burden of proof rests on the caveator as the person asserting the claim...

The next case which provides illustration of the same principle is the Federal Court case of *Mahadevan & Anor v Patel*[7] where at p 208 Suffian LP, dealing with s 323(1)(a), observed:

... and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat in my judgment it was proper for the respondent to enter the caveat, and right for the learned judge to refuse to remove it, so that it may remain on the register until the disposal of the suit pending between the company and the appellants.

In *Re Faulke's Caveat*,[8] in delivering the judgment of the court, Stout CJ, with regard to the same issue, said at p 393:

> In my opinion what the court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a prima facie case. He claims that he has an interest in the land mentioned in that it was to be set aside as a reserve to which he and others were to have access. It is not, therefore, like the case of *Staples & Co v Corby* 19 NZLR 517 and the case referred to in that judgment, where all that existed was a covenant that the owner would do certain things. This is more than a claim to an equity or to an equitable interest; it is a claim that the caveator is entitled to use the land. Whether this is a registrable interest is surely worthy of argument and consideration. I cannot say that the claim is so baseless or frivolous that the caveator should be denied the right to be heard. And it would be a denial of the right to be heard if the caveat were removed, for once the lease is registered the caveator's rights, if he has any, are destroyed.

By way of amplification it must be said that in all these cases the courts were concerned with the question of interest in land, both legal and equitable interest. Raja Azlan Shah FJ, however, aptly recognized that s 323(1) of the Code deals with more than just an interest in land. Still on the question of caveatable interest under s 323(1)(a) of the Code, the High Court of Australia case of *Municipal District of Concord v Coles*[9] is also illuminating. At p 106 Griffith CJ said:

> ... After a very anxious consideration of the words of the section and of the whole Act, we have come to the conclusion that the intention of the legislature in using the word 'interest' was that only a person having, or claiming to have, some legal or equitable interest in the land partaking of the character of an estate, or of an equitable claim upon the land, can be a caveator...

The more recent but quite a different approach to deal with the claim by a caveator that he has a right to lodge a caveat is to be found in the well known Privy Council case of *Eng Mee Yong*[4] where consideration of s 323(1)(a) was but briefly and cursorily given. It is entirely a new approach from that taken by the Malaysian courts or, for that matter, the Australian and New Zealand courts. At p 215 Lord Diplock, in dealing with the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for the removal of the caveat, laid down the following guidelines:

> ... The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability', a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried. (*American Cyanamid v Ethicon Ltd* [1975] AC 396.)
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> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat; he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo

until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

Further down the same page, Lord Diplock continued:

... So too in an application by the caveator under s 327 for removal of a caveat once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

The general principle that can be drawn from the above observations is that to entitle his caveat to remain in force on an application for its removal by the caveatee, the caveator must satisfy the court that his claim to interest in the land does raise a serious question to be tried, and secondly that the balance of convenience is in favour of allowing the caveat to remain. It can be clearly observed that Lord Diplock confined himself to the question of claim to an interest in the land and did not go further with the rest of s 323(1)(a), perhaps, induced to do so, on the particular facts of the case where the caveator claimed only an interest in the land, purportedly arising out of the sale and purchase agreement.

That in enunciating the guidelines Lord Diplock drew an analogy between the onus of an applicant in an interlocutory injunction and that of a caveator is too obvious to require elaboration. The two approaches may be different but the ultimate object is to determine whether a caveator, in order to maintain his caveat in force, has a claim to a title or interest in alienated land, or any right to such title or interest, although it must be said for the earlier approach that it is a direct one and easy to apply. The *Eng Mee Yong* approach palpably places emphasis on the existence of serious questions to be tried which of necessity demands the consideration of the nature and basis of the claim to the right to caveat. In this appeal it would, in our view, be more efficacious to apply both the traditional approach adopted in the *Macon Engineers* case[5] and Lord Diplock's guidelines as stated in *Eng Mee Yong*'s case.[4]

To revert to the issue before us the claim of the appellant that it has a right to lodge the caveat must be minutely inquired into in order to decide whether the caveat should remain on the register document of title or be removed. The appellant's case hinges solely on the true construction of s 214A of the Code in the light of the facts as they are presented to us by way of affidavits and by the arguments of the appellant's learned counsel. It was contended in essence by learned counsel for the appellant that although the land, purportedly transferred to the respondent, is actually only 209 acres, comprised in Lot 849 under Grant No 4125 virtually it is but a portion of the bigger Lukut Estate. We were referred to the second recital and cll 2 and 3 of the agreement which for the sake of convenience are reproduced in whole:

Whereas the vendor is the registered proprietor of the land in the state of Negeri Sembilan held under Document of Title G 4125 for Lot 849 in the Mukim of Port Dickson measuring in area 207 acres more or less comprising a portion of

A the vendor's Port Dickson — Lukut Estate (hereinafter referred to as 'the said estate').'

(2) This agreement is conditional upon the Estate Land Board either certifying that the sale of the said land is not affected by the provisions of section 214A of the National Land Code 1965 or upon approval of the Estate Land Board being given hereto. The parties hereto shall upon execution hereof make
B application jointly to the Estate Land Board for such certification or approval as the case may be.

(3) Subject to clause 2 hereof the sale and purchase shall be completed on or before the expiry of twelve (12) calendar months immediately following the execution of this agreement (hereinafter called 'the completion date') when the balance of the purchase price amounting to Ringgit Eight Hundred
C Seventy Four Thousand and Eight Hundred ($874,800) shall be paid by the purchaser to the vendor provided that if on the completion date hereof there has not been an acquisition of the 25 acres of the said estate as heretobefore mentioned in the preamble the parties hereto hereby agree that this agreement shall include the sale to the purchaser of the said 25 acres and that the terms and conditions herein contained shall apply equally to the sale of the
D said 25 acres provided further that the price of the said 25 acres amounting to Ringgit One Hundred and Fifty Thousand ($150,000) shall be paid by the purchaser to the vendor within one calendar month immediately following the completion date...

Under s 214A it is postulated that prior approval of the Estate Land Board must be obtained for the sale of Lot 849 and under sub-s (2) the registrar
E has no authority to register a memorandum of transfer of the said land unless the instrument is accompanied by a certificate of approval granted by the Estate Land Board. Since these provisions were not complied with, and in view of the manifest prohibition against fragmentation of estate land as is implicitly stipulated therein, the transfer is accordingly null and void ab
F initio. It would therefore follow, so run the arguments, since there is no valid transfer the appellant's title to the land is not affected by the purported transfer but still intact, or, to put it at its highest, it can be said that the appellant has a right to the title to the land. Hence, it has a caveatable interest to use the non-technical common parlance. To put its case in *Eng Mee Yong*'s formula the appellant has raised serious questions to be tried
G and that its claim is not frivolous or vexatious. That is in brief the appellant's contention. It is pertinent to interpolate at this juncture to say that we do not think it proper to approach this case upon the assumption that Civil Suit No S5-22-237-1987 filed by the appellant in the High Court will never come to trial but will in effect be finally disposed of by these interlocutory
H proceedings. It is abundantly clear from his judgment the learned judge below did just the opposite. We do not consider it proper and just that the question of the nullity or otherwise of the transfer be decided in these proceedings on contested evidence by affidavits, thereby rendering the civil suit otiose and an exercise in futility. Besides, to do so would be an embarrassment to the judge who hears the action. At this stage of the
I proceedings on the authorities of the cases of *Re Faulke's Caveat*,[8] *Chin Cheng Hong*[6] and *Eng Mee Yong*,[4] the relevant extracts of the judgments of which had already been quoted above, what we need to decide is not that the appellant must ultimately succeed but that it has a prima facie case and its claim is not frivolous or vexatious. Lee Hun Hoe CJ (Borneo) in *Su*

Meu Ging v Philip Yong Khiam Poon & Ors[10] at p 89 in the course of his judgment remarked:

> On the whole we consider that the appellants had shown their claim to an interest in the property and did raise a serious question to be tried and that on the balance of convenience it would be better to maintain the status quo. It is not for us to speculate whether the appellants would succeed or not at the trial. But there are clearly triable issues and they are entitled to have them tried.

Similarly, Raja Azlan Shah FJ (as he then was) in the *Macon Engineers* case at p 58 expressed the same view in similar vein:

> In the present case the respondent claims that he has an interest in the said land. He has filed a claim against the registered proprietors for specific performance, damages and lien over the said property. Whether he has good grounds for his alleged claim is surely worthy of argument and consideration. I cannot say that his claim is so baseless or frivolous that he should be deprived of his chance to have that tried in an action. And it would be a denial of that chance if the caveat were summarily removed, for once the appellants registered the transfer, the caveator's right, if he has any is destroyed. I further take the view that a caveat based on a document which prima facie is valid will not be removed on a summary application where the facts are involved and seriously disputed ...

We would, therefore, as a matter of prudence, abstain from expressing any opinion on the merits of the appellant's claim in respect of the voidness or invalidity of the transfer at the interlocutory proceedings.

What we need to look into now is whether there are any merits in the appellant's contention for the purpose of establishing that it has a title or a right to the title to Lot 849. To do this we have to ask the further question whether s 214A of the Code on its true construction applies to the present case, and if it does whether the appellant has raised serious questions to be tried. We are unable to agree with the contention of the respondent that in order to decide whether s 214A(1) and (2) apply to the purported transfer we need only to look at the actual acreage of the land comprised in Lot 849 and the subject matter of the impugned memorandum of transfer and the fact that it was the only person to whom the land was transferred. It is our view that, in accordance with established canon of construction of statutes, s 214A(1) should not be construed in isolation, divorced from other provisions of the section. It is well established that every section of an Act must be considered as a whole and self-contained with the inclusion of saving clauses and provisos. Subsections in a section must, therefore, be read as part of an integral portion and being inter-dependent, each portion throwing light, if need be, on the rest, and harmonious construction should be placed on their words for the purpose of giving effect to the legislative intent and object. As we understand it, the object of s 214A is to prevent and prohibit the fragmentation of estate land within the meaning of sub-s (11) of s 214A at the material time. (See *Erico Estates Sdn Bhd & Anor v Registrar of Titles, Kedah.*[11]) This is not disputed.

Subsection (10A)(a) is indubitably a penal provision and it makes it an offence punishable with imprisonment for a term not less than one year and not more than three years and to a fine not exceeding $10,000 for any person who transfers, conveys or disposes of or attempts to transfer, convey

or dispose of in any manner whatsoever, any estate land in contravention of sub-s (1). Section 214A(1) reads as follows:

> Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as 'the Board') established under subsection (3).

However, the proof of the commission of an offence under sub-s (10A)(a) can be gathered from the fact of the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or *to convey or dispose of any portion or portions of estate land to one or more persons, without the approval of the Estate Land Board.* In the event of such execution of the agreement it becomes conclusive proof that the estate land is conveyed or disposed of in contravention of sub-s (1). This is provided in sub-s (10A)(a). If, therefore, it can be proved by evidence that Lot 849 is a portion of the Lukut Estate, then the transfer of this lot constitutes an offence under sub-s (10A)(a).

The next pertinent question to be asked is: Does the transfer of that lot also become invalid or void because it contravenes s 214A(1)? In other words, can it not be argued that if it is an offence to transfer a portion of an estate land, being in contravention of s 214A, similarly that transfer of Lot 849 is accordingly and for the same reasons invalid? It would seem to us that if a transfer of a portion of an estate land is conclusive proof by force of a statutory provision of the contravention of s 214A(1) for the purpose of a conviction then, a fortiori, it must, by implication, also be conclusive proof of contravention of the same subsection for the purpose of invalidating the transfer of the lot. Any other construction of sub-s (10A)(a), (b) and sub-s (1) and effect of such construction would render s 214A ineffectual to achieve the attainment of its primary object which is the prevention and prohibition against fragmentation of estate land. If s 214A in its entirety is thus construed, we venture to say there is a strong likelihood that the appellant may succeed in the civil suit, although for the purpose of maintaining a caveat we hasten to emphasize, lest the foregoing statement be misunderstood, that it is only necessary for the appellant to show it has a prima facie case or that its case is well grounded as is the case here. It seems to us on first blush that s 214A is couched in mandatory terms non-compliance with which would be fatal to the transfer. Under the circumstances, it would be proper and just that the caveat should remain in force and the suit should go for trial to determine whether on the evidence as they are presented to the court the transfer is void ab initio, or just invalid and of no effect. The question whether Lot 849 is indeed a portion of the Lukut Estate and is contiguous to the rest of the estate is also a matter to be decided by evidence and cross-examination of witnesses at the trial.

Ex hypothesi s 214A applies then there is the further crucial issue whether the transfer is void ab initio or invalid and unenforceable or voidable. The issue entails the consideration of the class into which s 214A falls to be categorised, viz whether it is 'mandatory' or 'directory' and its effect on the transfer. The issue is further confounded by the protean nature

of the words 'void' and 'voidable', depending on whether they are used in the field of the law of contract or public law. There are bound to be conflicts in the authorities on both issues, and if there be such conflict of authorities it must be resolved at the trial. Furthermore, we had not been addressed on these issues making it more appropriate that the matter should not be decided here at this stage. The observations of Stout CJ in *Plimmer Bros v St Maur*[12] at p 295 would seem to be relevant:

> In my opinion the caveat cannot be set aside unless the claim to the estate appears to be without any validity. If there is a reasonable question to argue the Court should not remove the caveat, but permit the matter to be litigated ...

So are the observations of Raja Azlan Shah FJ (as he then was) in the *Macon Engineers* case[5] and Lee Hun Hoe CJ (Borneo) in *Su Meu Ging*'s case[10] adverted to earlier on in the judgment. In the light of our view of the appellant's contention on its claim to the title to Lot 849 we are satisfied that it is a person claiming title to the land and that its claim is neither frivolous nor vexatious.

We have been referred to the Federal Court case of *Hassan v Ismail*[1] on which the learned judge placed so much weight in his judgment for the proposition that a sale and purchase agreement is not void ab initio where the statutory prohibition against the transfer of land is not absolute and where there is a provision for exemption from the prohibition. In the first place s 37A of the Kelantan Land Enactment is not in pari materia with s 214A. In the Kelantan Land Enactment there is a provision for His Highness the Sultan in any particular case by order in writing to grant exemption from any of the provisions of s 37A whereas in the case of s 214A no land is capable of being transferred unless approval of such transfer has *first* (emphasis added) been obtained. In other words, the prior approval of the Estate Land Board is a postulated prerequisite to the validity of the transfer. Approval after transfer is not contemplated nor intended in s 214A and so is out of the question. In that case Suffian FJ (as he then was) took the view that since there was a provision for exemption the respondent could have applied for exemption from the prohibition. Secondly, in that case the transfer had not been effected, and therefore there was time to apply for exemption. Such is not the case before us where the land had actually been transferred *albeit* without the approval of the Estate Land Board and the registration of the instrument was executed without being accompanied by a certificate of approval. We do not think that this case is of any assistance to the respondent.

On the question whether after the transfer of Lot 849 has been registered and the full purchase price had been paid the purchaser could still lodge a caveat against the said land, *Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd*[2] was quoted as authority for the proposition that under such circumstances the caveat cannot remain on the register document. Again, this case can easily, as in the case of *Hassan v Ismail*,[1] be distinguished from the facts of the present case. In that case the respondent, Hadayat Harta Holdings Sdn Bhd had agreed to sell three lots of land to Ho Shee Jan, the appellant, for the price of $330,000 which the respondent acknowledged to have received. It was, inter alia, also agreed that the respondent should repur-

chase the said land for the sum of $580,000. Although the purchase price was paid in full the said land has not been transferred to the name of the appellant and the respondent's name remained as the registered owner. The appellant subsequently applied to enter caveats against the land because he claimed to be the purchaser of the land and also claimed that the respondent had not completed the repurchase of the land. The respondent applied to the High Court for the removal of the caveats. The respondent contended that the repurchase had been completed and it had become the owner and the appellant had no more caveatable interest in the said land. The application was granted and the appellant thereupon appealed to the Supreme Court which dismissed the appeal. On the facts of the case the respondent had paid the appellant in full the repurchase price of $580,000 and therefore the appellant did not have a caveatable interest anymore in the land. The claim of the appellant that he had a caveatable interest was based on the contention that the repurchase of the land by the respondent had not been completed and that he was still the registered owner when in fact this was not the case as found by both the High Court and the Supreme Court. The present case revolves around non-compliance with s 214A of the Code and as we have said earlier on the matter is to be tried in the action itself and not at the interlocutory proceedings stage. Manifestly, therefore, *Ho Shee Jan*'s case[2] has no application to the present case. We wish to comment here that these two cases were taken out of their context and thus without careful examination of the facts and the ratio decidenda of these cases they can be very misleading and conducive to erroneous decision on the crucial issues by the less circumspect of judges.

Similarly, *Eng Mee Yong*'s case[4] can be distinguished on the question whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. In that case Lord Diplock agreed with the judgment of the High Court to allow the removal of a private caveat because he was satisfied that the affidavits of the respondent contained implausible and self-contradictory assertions and that the statements in his affidavits were equivocal, lacking in precision, inconsistent with undisputed contemporary documents. In his view the allegations in the respondent's affidavit were insufficient to disclose that there was any serious question to be tried as to whether any agreement for the sale of the land by the appellant to the respondent was still subsisting at the date of the hearing of the application. The effect of the Privy Council decision is to render the respondent's action in the High Court nugatory, it having been literally disposed of. In the present case we are satisfied that the appellant's claim is not frivolous and vexatious and that there are serious questions to be tried with the result that, unlike *Eng Mee Yong*'s case,[4] we have decided the civil suit should go for trial.

In an application under s 327 the learned judge is vested with a discretion which he must exercise judicially or according to law. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigations as to their truth, ie the matter should go for trial. (*Eng Mee Yong*[4] per Lord

Diplock at p 217.) We respectfully agree with this observation and we are mindful of the fact that it is not our function to exercise an independent discretion of our own. We may differ from the learned judge's exercise of his discretion and must not interfere with it merely upon the ground that we would have exercised the discretion differently. Nevertheless, we may set aside the learned judge's exercise of his discretion on the ground that he had not acted judicially or that it was based upon a misunderstanding of the law of the evidence before him or upon an inference that particular facts existed or did not exist. We have given anxious consideration to this matter and we, with respect, do not think that the learned judge had exercised his discretion judicially when he clearly addressed his mind to irrelevant matters. Nowhere in his judgment did he ever advert to and discuss in detail the decisive question of the legitimacy of the appellant's claim or the existence of serious issues to be tried by reference to s 214A. He had completely brushed aside the appellant's contention on the applicability of s 214A to the case, holding that it did not apply to the transfer of the 207 acres, it not being an estate land as understood in the Code. Under the circumstances, we are justified in making a finding that the learned judge had not exercised his discretion judicially so that his decision to remove the caveat becomes manifestly aberrant.

Eng Mee Yong's case[4] also lays down the proposition that if a caveator has succeeded in satisfying the court that his claim is neither frivolous nor vexatious, nevertheless the appellant must go on to show on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the respondent from disposing of its land to some third party. In this regard to quote Lord Diplock's observations at p 215 of that case, repetitive it may seem but nevertheless purposive, would be instructive to the instant case. The relevant part is in the following words:

> ... So too in an application by the caveator under s 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious matter to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

It must be noted that all the Malaysian, New Zealand and Australian cases already quoted in this judgment did not consider the question of balance of convenience in dealing with an application for removal of a caveat. Their emphasis was only on whether the caveator had a caveatable interest.

Inordinate delay was another ground for the learned judge below to allow removal of the caveat, relying as authority for his decision on the Singapore High Court case of *Teo Ai Choo v Leong Sze Hian*.[3] The learned judge, with due respect, allowed himself to be persuaded to accept this case as an authority that delay in lodging a caveat is fatal to the continuation in force of the caveat without giving due and careful consideration to the context of the case. We have carefully examined that case and noted that the delay was not in lodging the caveat but was related to the commencement of the action by the defendant in respect of their dispute.

Sinnathuray J based his decision on an extract of the judgment of Stout CJ in the case of *Plimmer Bros v St Maur*[12] which reads as follows:

> It was his duty to commence an action promptly if he considered himself entitled to specific performance... Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since then, and still no action has been commenced. In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious... in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.

Therefore, *Teo Ai Choo's* case[3] does not avail the respondent. No other authorities were quoted on this question. If at all, delay may be a factor that can be taken into consideration in dealing with the question where the balance of convenience would lie. However, in view of Lord Diplock's observation quoted above, since we are satisfied the appellant's claim on which its caveat is based raised a serious question to be tried, then the balance of convenience would be in favour of leaving the caveat in existence until the trial of the action, in the absence of any special circumstances. Furthermore, we have not been addressed on the presence of special circumstances in this case although the learned counsel referred us to the affidavit of Soo Tian Chai, a director of the respondent company. In his affidavit, Soo Tian Chai averred that the respondent had obtained approval for the subdivision of the said land and the category of land used and had expended some $3m towards the development and improvement of Lot 849. This was vigorously disputed by the appellant. In his affidavit, Wong Yew Fai, a director of the appellant company, denied any knowledge of the subdivision, conversion of use of land, the improvement and development on the land and the amount spent thereon. He claimed that the appellant had given notice through its solicitors to the solicitors of Ezan Sdn Bhd and that the appellant would not be liable for any loss or damage which the respondent might have incurred in the event the suit was decided in the respondent's favour. No evidence of the actual expenditure on the improvement and development was introduced in the court below to support the respondent's claim. However, learned counsel for the respondent submitted before us that preparations were made for the development of the said land in reply to learned counsel for the appellant's submissions that there was nothing on the land.

These are disputed facts and could hardly subserve the existence of special circumstances to tip the balance of convenience in favour of the respondent. Always bearing in mind that the crucial issues in this appeal involve the true construction of what seems to be imperative statutory provisions and their significant effects on the transfer of the land in question coupled with all the possibilities that the respondent may do with the land to jeopardize the appellant's title to the land in the event the action is decided in its favour, it seems grossly invidious to remove the caveat. Furthermore, learned counsel for the appellant assured this court that should the action fail the appellant is prepared to recompense the respondent for whatever harm it may suffer as a result of the caveat. In the light of

these considerations the question of the delay in lodging the caveat in the first place does seem to matter so insignificantly as to upset the balance of convenience in favour of leaving the caveat in force. After all, the object of the lodging of the caveat is to prevent any dealings on the land. Under the circumstances, it would be proper and equitable to allow the caveat to remain in force.

As for the protection of s 340 of the Code sought by the respondent, it would appear to be premature to invoke the protection under this section at this state. The proper forum to raise this question is the trial itself where the question of the rectification of the register of titles by the reinstatement of the appellant as proprietor would be argued.

We realize it is imperative that the action should be heard as early as possible but we do not consider it proper to make an order for an early trial and fix the date of the trial. It is consistent with the practice of this court to leave the matter of the fixing of the date of early trial to both counsel to apply to the appropriate quarters. We need only to say that an early trial is recommended.

For the reasons we have given above in our judgment, we would allow this appeal with costs. The order of the High Court dated 3 December 1990 is set aside. The deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim